United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

No. 75-7017

United States Court of Appeals

FOR THE SECOND CIRCUIT

AACON AUTO TRANSPORT, INC.,

Plaintiff-Appellant,

vs.

JOHN BRUIN, d/b/a INTERSTATE AUTO DELIVERY and INTERSTATE AUTO DELIVERY, INC.,

Defendants-Appellees.

On Appeal From the United States District Court for the Southern District of New York.

APPELLEE'S BRIEF.

RUSSELL & SCHUREMAN,
1545 Wilshire Boulevard #606,
Los Angeles, Calif. 90017,
(213) 534-1444,
Attorneys for Defendant-Appellee John Bruin.

CHRISTOPHER ASHWORTH,
Of Counsel.

Dated: March 20, 1975.

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STATUTES AND OTHER AUTHORITIES

Cases Cited:

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the District Court "refuse" the injunctive relief sought by the plaintiff-appellant [hereafter "AAACON" or "Appellant"] within the meaning of 28 U.S.C.A. §1292 (a)(1)? Stated more concisely, is the denial of a preliminary injunction "without prejudice to repetition for a preliminary injunction in [the transferee court]" an appealable interlocutory decision?

2. Is the issue of the District Court's order to transfer the cause pursuant to 28 U.S.C.A. 1404(a) properly before this court on appeal?

3. Assuming that the refusal to grant the prayed-for injunctive relief without prejudice is an appealable interlocutory decision, did the District Court clearly abuse its discretion in so refusing the injunction against the appellee? [hereafter "appellee" or "Bruin"].

4. Assuming that the issue of the transfer pursuant to 28 U.S.C.A. §1404(a) is properly before this court on appeal, was the transfer such an abuse of discretion as will warrant either reversal or extraordinary relief?

STATEMENT OF THE CASE

The statement of the case in the appellant's brief is adequate for the purposes of this appeal except to note that the defendant-appellee did not move the District Court to transfer the matter to the Central District of California by invoking the doctrine of forum non conveniens.[1/] In addition, Judge Bonsal did not "deny" appellant's application for a preliminary injunction within the purview of 28 U.S.C.A. §1292(a)(1).[2/]

1/ Appellant's Brief, page 4

2/ Appellant's Brief, page 5

ARGUMENT

I. The District Court did not "refuse" the Injunctive Relief sought by AAACON, and thus an appeal does not properly lie.

The authority of the courts of appeal to review interlocutory decisions of the district courts is found in 28 U.S.C.A. §1292. Section 1292 (a) (1) of that title declares that the courts of appeal shall have jurisdiction of appeals from interlocutory orders of the district courts' "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions...".

AAACON prayed for a preliminary injunction restraining Bruin from comepting against AAACON "in violation of his agreement with plaintiff". [Appendix, page 19].

Within the context of this case, the order complained of [Appendix, pages, 1, 2] is appealable only if injunctive relief was "refused". The said order iterates that "the petition for a preliminary injunction prayed for by [AAACON] is denied without prejudice to repetition for a preliminary injunction in the [transferee court]." [Appendix, page 2].

It is clear from the context that the denial "without prejudice" is purely incidental to the portion of the order which transferred the matter to the Central District

of California. The "denial" of the injunctive relief at that particular stage of the proceeding was simply a deferment to another day of a hearing on the matter.

The district court was apparently of the opinion that proof of any continuing wrongdoing on the part of Bruin would require testimony at the situs of the alleged wrongdoing. The hearing on the order to show cause and cross-motion for change of venue bear out this contention:

> MR. AMES: "... And I respectfully request that the Court set this down for a hearing to determine..."
>
> THE COURT: "Who is going to testify at this hearing? All these people in California? What are you going to do, bring them all here?"
>
> * * *
>
> THE COURT: "I think what I am going to do, gentlemen, on this thing, I think I am going to deny a preliminary injunction without prejudice. I think I am going to grant the motion for a change of venue to California, because it seems to me that if there has been any violation of this clause precluding competition for one year, the testimony is going to be out there, and I don't quite see why we ought to bring a lot of Californians to New York to testify about that." [Appendix, page 64, line 22; page 65, line 15].

There is scant decisional authority squarely on the facts of this case. However, at least one case holds that where the order of the court merely defers the date of the hearing on the injunctive portion of a lawsuit, then the relief sought was not "refused" within the meaning of 28 U.S.C.A. §1292 (a) (1).

In City of Fort Lauderdale v. Freeman, (5th Circuit) 197 Fed. 2d 122 (1952), the city moved to terminate and cancel a lease of real property to a bankrupt (in essence a motion to dissolve a status quo injunction). The district court upheld the decision of the referee to defer decision pending an evidentiary hearing. The Court of Appeals dismissed the city's appeal noting that deferment to another day of the hearing on the matter was not a "refusal" to dissolve an existing injunction. City of Fort Lauderdale, supra at 124.

A very similar problem has received considerable judicial attention. The problem develops in the context of grants or denials of interlocutory relief where the effect of the grant or denial can be characterized as an exercise of the inherent powers of a court to control the progress of the case before it so as to maintain the orderly process of justice.

In Morgantown v. Royal Insurance Co., 93 L. Ed. 1347, 337 U.S. 254 (1949), the plaintiff (respondent) filed an action to reform a contract of insurance. Defendant (petitioner)

cross-claimed to recover on the policy as written. Petitioner then filed a demand for jury trial which was stricken at the instance of the respondent. Petitioner appealed and the Fourth Circuit dismissed the appeal. The Supreme Court affirmed, noting that this was "a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself", (93 L. Ed. at 1350), and not the equivalent of enjoining the commencement of an action at law.

Similarly, the Supreme Court has affirmed the dismissal of appeals from other interlocutory decisions that bore superficial resemblance to grants or denials of injunctive relief. Baltimore Contractors v. Bodinger, 99 L. Ed. 233 (1954): "This was a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction." (99 L. Ed. at 240); Switzerland Cheese Association v. Horne's Market, 17 L. Ed. 2d 23, 385 U.S. 23 (1966): The "denial of a motion for summary judgment [which included injunctive relief], because of unresolved issues of fact, does not settle or even tentatively decide anything about the merits of the claim." (17 L. Ed 2d at 25).

It would appear that in order for an order to be appealable under 28 U.S.C.A. §1292 (a) (1), it must "settle or...decide [something] about the merits of the claim," and go beyond the inherent power of the trial court to control the progress of the case before it.

Fairly read, the order of Judge Bonsal decided or settled

nothing regarding the merits of AAACON's claim to injunctive relief, but rather deferred the hearing on the prayed-for injunction to a later date. 1/

If the foregoing is the correct interpretation of Judge Bonsal's order, then the deferral of the hearing on the preliminary injunction is not the proper subject of an interlocutory appeal, and this portion of the appeal should be dismissed.

II. Is the issue of the district court's order to transfer the cause under 28 U.S.C.A. §1404 (a) properly before this court on appeal?

The short answer to the question posed immediately above is "no".

Since this court decided Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., (2nd Circuit) 178 Fed. 2d 866 (1950), the rule in the Second Circuit has been that an order transferring a matter to another district pursuant to 28 U.S.C.A. 1404(a) is not an appealable interlocutory decision.

In that case, the district court denied an application for a preliminary injunction and transferred the cause to another district. Both portions of the order were challenged on appeal. The denial of the injunction was reversed and the Court of Appeals issued the injunction "as prayed". Magnetic

1/ Counsel for Bruin cannot resist noting that if AAACON were genuinely interested in relief from alleged irreparable harm, it could have proceeded in the District Court in California and, if injunctive relief were appropriate, would have already received it.

Engineering, supra, at 868. However, the court dealt swiftly and unequivocally with the issue of the appealability of the order to transfer pursuant to 28 U.S.C.A. §1404 (a).

> "... [W]hen an action is transferred it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has already been done... the appeal from that part of the order will be dismissed." Magnetic Engineering, supra, at 868, 869.

Judge Friendly noted in a more recent case regarding the appealability of orders to transfer that,

> "[W]hile we granted the motion [to dismiss the appeal] in open court, it seems desirable to issue this opinion in the interest of eliminating similar appeals in the future." D'Ippolito v. American Oil Company, (2nd Circuit) 401 Fed. 2d 764.

Counsel for Bruin have searched the decisions of this circuit with some care, and find that the decision in Magnetic Engineering, supra, pointedly ratified by D'Ippolito, supra, is still the ruling case law.[1/] The appeal should be dismissed.

1/ The only exceptions to this rule that counsel can find involve appeals based upon asserted lack of power to transfer, and, in one case, where the transfer of several actions was certified to the appellate courts under 28 U.S.C.A. §1292 (b). As to the first case, see e.g. National Equipment Rental v. Fowler, 2nd Circuit) 287 Fed. 2d 43 (1961): Second Circuit reversed the district judge who ordered a cause to be transferred to his court. As to the second case, see: Wyndham Associates v. Bintliff, (2nd Circuit) 398 Fed. 2d 614 (1968): District Court Judge certified the complex transfer issue under 28 U.S.C.A. 1292 (b).

III. Assuming that the refusal to grant the prayed-for injunctive relief without prejudice is an appealable interlocutory decision, did the District Court clearly abuse its discretion in so refusing the temporary injunction against Bruin?

In order to issue a temporary injunction, the trial court must have before it sufficient facts to determine the scope and extent of the injunctive relief sought and to draft the order in such fashion so that the party enjoined can discern from the four corners of the order what is forbidden. [Sanders v. Air Line Pilots Association, (2nd Circuit), 493 Fed. 2d 244 (1972)].

The party applying for an injunction in this case is a carrier of automobiles in secondary movements in driveaway service "between various points in the United States, pursuant to authority MC-125808." [Affidavit of Zola, ¶2, Appendix, page 10].

Because any contractual relationship between the parties had terminated by the time of the hearing on the various motions [Transcript page 3, lines 21-23; Appendix page 55], the relief sought by AAACON obviously had to be confined to the post-employment context.

AAACON's asserted post-employment right vis-a-vis Bruin amounts to a contractual promise "not [to] engage in any transportation activity as principal, agent, employee or otherwise in competition with AAACON [for one year after the termination of the contract." [Appendix page 24, ¶6].

Nowhere in any of the affidavits submitted by AAACON, is there to be found a more complete description of AAACON's interstate authority than that found in the affidavit of Zola [Appendix, page 10] wherein the said authority is described as the transportation of "automobiles in secondary movements in driveaway service between various points in the United States, pursuant to authority MC-125808."

Appended to the affidavit just referred to and marked Exhibits "A", "B" and "C" [Appendix, pages 13-15] are three transportation documents which AAACON apparently advances as a partial catalogue of the sins and omissions of Bruin:

1. Exhibit "A" portrays a movement in interstate commerce originating in Sacramento, California and apparently ending in Eugene, Oregon. Assuming that Judge Bonsal did not have before him a copy of AAACON's certificate of public convenience and necessity, or the scope of operations portion of AAACON's tariff,[1/] then he would have no idea whether Eugene, Oregon and Sacramento, California were among the "various points" which AAACON is authorized to serve.

Alternatively, assuming that Judge Bonsal did review the certificate or tariff of AAACON he would have noted that AAACON's operations are "restricted against the transportation of any traffic: (1) having a prior movement by rail or water, (2) moving on government bills of lading, or (3) moving to automobile dealers." [AAACON AUTO TRANSPORT, INC.,

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1/ Neither document was offered in evidence by AAACON.

Certificate of Public Convenience and Necessity MC-125808]. He would also have noted that the automobile moved to "Joe Romania Chev[rolet]", and thereby concluded that AAACON could not compete for that traffic in any event.

2. Exhibit "B" portrays a movement from Santa Clara, California to Los Angeles, California. Being intrastate in nature, this traffic is not competitive with that of AAACON.

3. Exhibit "C" portrays a movement in interstate commerce from Alameda, California to Salt Lake City, Utah. Again, there is no evidence indicating whether this traffic moved between the "various points" which AAACON is authorized to serve. Moreover, because the traffic moved to Nationwide Auto Transporters, another carrier, the ultimate consignee cannot be determined. It is the status of the ultimate consignee (automobile dealer or non-automobile dealer) that determines whether any traffic is competitive with AAACON.

The only other arguably admissible evidence by way of affidavits which might remotely connect Bruin with post-employment competition with AAACON are found in the following places in the Appendix:

1. Appendix, page 11, ¶7: This is an assertion by the affiant that Bruin is continuing "illegal transportation in violation of [the agency agreement]". The assertion was based upon the affiant's "information and belief." Judge Bonsal could well believe that the affiant was "informed and believed", but he could not treat the subsequent assertions

as evidence. [Bowles v. Montgomery Ward, (Seventh Circuit) 143 Fed. 2d (1944)].

2. Appendix, page 42, ¶13: The affiant declared that "[AAACON] has been advised by these institutional customers that they would deal directly with [AAACON] in the future were John Bruin 'out of the picture.'." Aside from the offensive vagueness and hearsay aspect of that statement, Judge Bonsal would have to believe that the "institutional customers" could not remove themselves from the grasp of Bruin however much they might want to. Further, the statement only deals with the character of the potential customer, and not the nature of the traffic or the territorial scope of any future "institutional" business.

3. Appendix, page 43,¶2 and annexed Exhibit "A": The affiant is a stranger to the agreement between Bruin and AAACON. He asserts that "I am advised that [the annexed exhibit] was effected by John Bruin." The annexed Exhibit "A" portrays a movement in interstate commerce from Shreveport, Louisiana to Hayward, California. The named consignee is "Hayward Motors", apparently an automobile dealer. This evidence could not be considered by Judge Bonsal because it is hearsay, which is not rendered admissible by any exception to the hearsay rule. Moreover, the alleged movement is outside the scope of AAACON's authority.

The inability or unwillingness of AAACON to demonstrate the precise nature of competition that equity is asked to enjoin

would not have permitted Judge Bonsal to form any meaningful injunction even if Bruin had not submitted any evidence whatever. Judge Bonsal not only did not abuse his discretion in "denying" the sought-for injunctive relief, but, rather, would likely have done so if he had granted any injunction based upon the evidence before him.

IV. Assuming that the issue of the transfer pursuant to 28 U.S.C.A. §1404 (a) is properly before this court on appeal, was the transfer such an abuse of discretion as will warrant either reversal or extraordinary relief?

The review of orders to transfer, pursuant to §1404(a) in the Second Circuit, seems to be limited to three circumstances:

1. By appeal in rather rare cases where the issue presented for decision is the power of the district court to order the transfer. This is not an issue involved in this appeal. [See footnote at page 6 of this brief.]

2. By appeal where the district court judge certifies the matter pursuant to 28 U.S.C.A. §1292 (b). This is not an issue involved in this appeal. [See footnote at page 6 of this brief.]

3. By application for writ of mandamus in which case the review is limited to consideration of whether (a) "... the trial court had power to make that transfer..." or (b) "...whether it committed a gross abuse of discretion by causing extreme hardship on the party who opposed it..."

Ackert v. Pelt Bryan, (2nd Circuit) 299 Fed. 2d, 65, 68 (1961).

It appears that the only recognized basis for review that might be presented in this case involves whether Judge Bonsal's order was a gross abuse of discretion which will cause extreme hardship on AAACON.

Any extreme hardship visited upon AAACON by the order must, in the nature of things, involve difficulty of proof or prohibitive expense in transporting witnesses, or both.

On brief, AAACON urges that "six vital witnesses" will be required to testify at the trial of this action:[1/] i.e., Ralph Zola, Harvey Blackman, Max Bardack, Allan Herman, Alfred Rappeport, and Barney Daly.

1. In his affidavit [Appendix, pages 33 and 34], Mr. Zola states that "[all] of the statements contained in Mr. Blackman's affidavit... are true." It would appear that the presence of both Mr. Zola and Mr. Blackman are unnecessary.

2. The only reference to Max Bardack to be found in the record before the district court appears in "Plaintiff's Reply Memorandum, etc.", undated and filed October 23, 1974. It should be noted that AAACON opposes the inclusion of that memorandum in the record on appeal. [Affidavit of Paul Zola, dated March 13, 1975]. Assuming that the memorandum has some evidentiary value, Mr. Bardack's testimony would apparently

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1/ [Appellant's Brief, pages 6 and 7]

be limited to offering proof of the absence of business record entries in order to establish the non-occurrence of an event. The Federal Rules of Evidence do not require that "non-occurrence" testimony be sponsored by a custodian of records.[1/] An officer of the appellant, e.g., Mr. Ralph Zola, certainly could testify regarding the absence of these business entries.

3. With regard to Messrs. Daly and Rappeport, the affidavit of Zola [Appendix, page 35, ¶9] states that Bruin attempted to cause these gentlemen to breach their agency agreements with AAACON, which attempt was rebuffed. Their testimony would only be useful to show that Bruin did not harm AAACON. More importantly, there is no cause of action pleaded in the complaint on file herein which is premised upon the theory of Bruin's tortious interference with AAACON's contractual relationships. It is not clear that any evidence these men might offer is relevant to the issues raised by the complaint.

4. With regard to Allan Herman, a perusal of the affidavit submitted by that gentlemen would reveal that nearly all of his proposed testimony involves twice-removed hearsay statements which would not be admissible at trial. [Appendix, pages 43 and 44]. His assertion that Bruin is not an employee of Nationwide Auto Transporters, Inc. is not relevant to any issue involved in this matter. His presence at trial could not be termed "vital" given the evidence of record.

1/ Contrast Federal Rules of Evidence Rules 803(6) and 803 (7)

By process of elimination, it appears that of the persons above named, only Mr. Zola or Mr. Blackman would be required to testify on behalf of the plaintiff-appellant at trial.

Transporting one witness to a trial, even in a distant jurisdiction, could not reasonably he construed as an "extreme hardship" on the appellant. Consequently, the order of Judge Bonsal, insofar as it granted the appellee's motion to transfer should not be reversed.

IV. Conclusion.

In the foregoing premises, the appellee urges that the within issues raised by appellant are not properly before this Court on appeal and consequently the appeal should be dismissed.

However, should this Court find that the issues raised by appellant are properly before the Court, then the order of Judge Bonsal should be affirmed.

Respectfully submitted,

RUSSELL & SCHUREMAN

By Christopher Ashworth
Christopher Ashworth

Attorneys for Defendant-Appellee

1545 Wilshire Boulevard, Suite 606
Los Angeles, California 90017
Telephone: (213) 483-4700

CERTIFICATE OF SERVICE BY MAIL

I, Sallie Pritchard, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is 1545 Wilshire Boulevard, Los Angeles, California 90017; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by Christopher Ashworth of RUSSELL & SCHUREMAN, Attorneys, who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on March 21, 1975, I deposited in the United States mails at 1545 Wilshire Boulevard, Los Angeles, California in the above-entitled action, in an envelope bearing the requisite postage, three copies of:

APPELLEE'S BRIEF

addressed to:

ZOLA and ZOLA
228 West 41st Street
New York, New York 10036

at their last known address, at which place there is a delivery service by the United States mail.

This Certificate is executed on March 21, 1975 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

Sallie Pritchard